



# ENVIRONMENTAL QUALITY COUNCIL

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<b>GOVERNOR BRIAN SCHWEITZER</b> <b>DESIGNATED REPRESENTATIVE</b> MIKE VOLESKY	<b>HOUSE MEMBERS</b> CHAS VINCENT--Chair SUE DICKENSON JULIE FRENCH MIKE MILBURN CARY SMITH FRANKE WILMER	<b>SENATE MEMBERS</b> BRADLEY MAXON HAMLETT--Vice Chair JIM KEANE RICK RIPLEY JIM SHOCKLEY MITCH TROPILA BRUCE TUTVEDT	<b>PUBLIC MEMBERS</b> JEFF PATTISON BRIAN CEBULL DIANE CONRADI MARY FITZPATRICK	<b>COUNCIL STAFF</b> JOE KOLMAN, Research Analyst SONJA NOWAKOWSKI, Research Analyst HOPE STOCKWELL, Research Analyst CYNTHIA PETERSON, Secretary TODD EVERTS, Legislative Environmental Analyst
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September 1, 2010

**TO:** EQC members  
**FR:** Joe Kolman, EQC staff  
**RE:** LC 8002--Use of navigable river beds

During the EQC's July meeting, members directed staff to put LC 8002, regarding use of navigable river beds, out for public comment.

Public comment was taken between July 30 and August 30. Attached are the comments received in that time period. If additional comment is received prior to the September 13 meeting, it will be included in your meeting folders.

CI2255 0243hsxa.

## **Stockwell, Hope**

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**From:** niki@redquillranch.com  
**Sent:** Thursday, July 29, 2010 11:06 AM  
**To:** Kolman, Joe  
**Subject:** Our Rivers

### **Comments on SB 507**

Dear Committee,

Simple me -

1. Who ever pays land tax on the river bottom owns the land.
2. If the State of Montana owns the river bottom = the people own the river bottom.
3. The Citizens of Montana shouldn't have to pay a tax (license, for an easement) to float across the land they own.
4. The State of Montana provides no services along these fee rivers, (bathrooms, campgrounds, etc) how would the fees collected to be used?

Are they redistributed to all Citizens?

I thought all Montanans have the right to go on all waterways.

Don't close off river use with SB507.

Thankyou,

Niki Sardot

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



BRIAN SCHWEITZER, GOVERNOR

1625 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE (406) 444-2074  
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PO BOX 201601  
HELENA, MONTANA 59620-1601

August 10, 2010

Environmental Quality Council  
Honorable Chas Vincent, Chairman

Dear Representative Vincent:

I appreciated the Committee's interest and discussions regarding LC 8002 that pertains to the state's ownership and management of navigable waters. I have reviewed the draft legislation and offer the following observations and comments.

The State holds title to the beds of navigable waters, and this asset is administered by the Board of Land Commissioners for the benefit of the public land trust. The Board is obligated to manage all navigable rivers, and must obtain full market value for any use of the beds of these rivers under Art. X, Section 11 of the 1972 Montana Constitution. See, PPL Montana, LLC v. State, 355 Mont. 402, 444, 229 P.3d 421, 450 (2010). In order for the Board to fulfill these Constitutional fiduciary duties, I suggest the following revisions to the legislation:

1. In Section 1 (b) strike "must" and replace with "may."

Comment: The State Land Board retains the Constitutional authority to determine whether it will grant or deny any application for a lease, license, or an easement.

2. Strike Section 1 (d) in its entirety.

Comment: The payment of taxes does not and cannot represent compensation to the public land trust for use of a navigable riverbed owned by the State and held in trust for the public. Property taxes are assessed to satisfy local taxing jurisdictions' functions and expenses. The Montana Supreme Court in PPL Montana, LLC v. State held that the State must obtain the full market value for any use of the beds of navigable waters.

3. In Section 2 (3) add:

Rivers or lakes that are navigable in fact must be regarded as navigable in law; and rivers or lakes are navigable in fact when they are used, or were susceptible of being used at the time of statehood, in their natural and ordinary condition, as highways for commerce over which trade and travel were, or may be conducted in the customary modes of trade and travel on water.

Comment: This legal definition is consistent with the accepted judicial definition of navigable waters provided by the U.S. Supreme Court in The Daniel Ball, 10 Wall. 557, 77 U.S. 557, 19 L.Ed. 999 (1870), and the same definition was utilized by the Montana Supreme Court in PPL Montana, LLC v. State, 355 Mont. 402, 414, 229 P.3d 421, 431 (Mont.,2010). The List of Navigable Rivers that the DNRC developed not only satisfies, but exceeds, the legal definition of "susceptible for use in commerce" because it lists those waters for which there is documented actual historic use of the river for commerce at the time of statehood.

As noted in the Department's fiscal note for SB 507 in 2009, we would anticipate that the state would receive 200 easement applications a year at an average easement fee of \$500 per year, generating \$100,000 annually to Common Schools. We would anticipate issuing 150 land use licenses annually at \$150 each for an annual revenue stream of \$22,500 each year. The State claims ownership of approximately 3,361 miles of navigable waterways on stretches of 38 streams, lakes, and rivers. Nine of the rivers have been judicially determined to be navigable. Historically, eight out of ten permanent easements issued have been across non-adjudicated waterways. Additionally, the trust receives an additional \$25,000 annually on non- adjudicated and meandered waters for oil and gas leasing activities. **Based on the Department's analysis, the annual income from non-adjudicated waterways could be in the range of \$125,000.**

Sincerely,



Mary Sexton  
Director, DNRC

cc: Candace F. West, Tom Schultz, Joe Lamson, Jeanne Holmgren

## Stockwell, Hope

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**From:** Towlerton, Al [TowlertonA@ci.billings.mt.us]  
**Sent:** Tuesday, August 24, 2010 3:19 PM  
**To:** Kolman, Joe  
**Cc:** Mumford, David; Heisler, Vern; Rubich, Mike  
**Subject:** Use of stream beds bill draft

Mr. Kolman:

We offer the following comment on the proposed bill in the draft WQIC draft report:

**LC 8002** – We suggest that the bill language be clarified regarding when the fair market value of the riverbed applies. SB 507 from the 2009 legislature contained the same confusing language. For example, Section 1(1)(e) says that an applicant "...shall apply to the state for a lease, license or easement and pay full market value for the use of the riverbed...". Yet Section 2(2) indicates that the annual payment for a license shall be \$150, apparently unrelated to the full market value.

Thanks for the opportunity to comment and let me know if you have questions.

Cordially,

Alan Towlerton  
Deputy Public Works Director  
2224 Montana Avenue  
Billings, MT 59101  
(406) 657-8314  
[towlertona@ci.billings.mt.us](mailto:towlertona@ci.billings.mt.us)



**Senior Water Rights Coalition**  
PO Box 7325 Helena, MT 59604  
(406)439-2215    blakecrk@Gmail.com

August 30, 2010

Rep. Walt McNutt, Chairman  
Water Policy Interim Committee  
PO Box 201706  
Helena, MT 59620-1706

Dear Representative McNutt and WPIC Committee Members,

The Senior Water Rights Coalition welcomes and appreciates the opportunity to provide public comment on legislation that the WPIC is considering for introduction in the 2011 Legislature.

LC 8002 – Use of River Beds

The SrWRC strongly supports the language of LC 8002 as currently drafted. We believe that this piece of legislation is critical to provide a clear, fair, and defensible process for assessing users a fee for the use of a river bed below the low water mark on rivers that are navigable for title.

The water users of Montana who are irrigators have a Constitutional right to exercise their water rights. It is imperative that the process of assessing fees associated with owning a structure that is located on a river that is navigable for title is not so onerous that water right holders can no longer exercise their water rights. We believe the LC8002 provides a fair and reasonable process.

The definition of "navigable river" in Section 2 subsection (3) makes it very clear that a court is the only entity that can determine whether or not a river is navigable for title. Because the determination is very fact intensive and site specific it makes sense to have a court determine whether or not a river was navigable at the time of statehood. Additionally, absent a navigability determination by a court of competent jurisdiction there is no legal mechanism for riparian property owners to defend their property rights or even be made aware that an assertion of ownership by the state is being made.

We believe that LC 8002 applies only to the determination of navigability for title under the equal footing doctrine and does not apply to navigability for recreation purposes under the public trust doctrine. We believe that these are two separate and distinct determinations. Additionally, LC8002 makes it clear that the bill does not apply to those uses related to hunting, fishing, or trapping.

LC 9002 – Water Marketing

The SrWRC supports LC 9002. We believe that the process outlined for changing a water right to marketing will facilitate the use of leased water for mitigation purposes. Additionally, the process outlined for changing a water right to a mitigation purpose will provide a mechanism for water right sellers and water right buyers to meet. The ability of new developments to find and use mitigation water to offset adverse affect is critical to continued growth and development in Montana.

Sincerely,

Krista Lee Evans



# AGAI

[www.AGAIMT.com](http://www.AGAIMT.com)

Association of Gallatin Agricultural Irrigators

August 30, 2010

Rep. Walt McNutt, Chairman  
Water Policy Interim Committee  
PO Box 201706  
Helena, MT 59620-1706

Dear Representative McNutt and WPIC Committee Members,

Thank you for the opportunity to comment on legislation that the WPIC is considering. Our ability to exercise and protect our water rights is crucial to our livelihoods. Changes in Montana's water laws can have incredible economic impacts to our businesses. We take our responsibility to be informed water users very seriously.

#### LC 8002 – Use of River Beds

AGAI strongly supports the language of LC 8002 as currently drafted. AGAI members have diversions, ditches, tip ups, pump sites, etc located in or on the Gallatin River. How DNRC and the State Land Board determine which rivers are navigable for title and how footprint users will be assessed for that use has a direct impact on our members. Currently, the process for assessing users a fee for the use of a river bed below the low water mark on rivers that are navigable for title is confusing and not always applied equally across the landscape. LC 8002 provides a process that is fair to users as well as the State of Montana.

Our ability to continue to produce agricultural crops hinges upon our ability to irrigate in an economical manner. The protections and confirmation of our water rights that Article IX, section 3 of the Montana Constitution provides are critical. LC8002 takes the necessary step of balancing Constitution provisions in a way that is fair and equitable to all parties. It is imperative that the process of assessing fees associated with owning a structure that is located on a river that is navigable for title is not so onerous that water right holders can no longer exercise their water rights. We believe the LC8002 provides a fair and reasonable process.

AGAI strongly supports the definition of "navigable river" in Section 2 subsection (3). This definition makes it very clear that a court is the only entity that can determine whether or not a river is navigable for title. The determination of navigability is a very fact specific determination. It is appropriate that a court weigh all the evidence and provide an opportunity for those who believe they own the property to provide their evidence. When the question surrounds the legal ownership of property it is unheard of to make that determination based solely on an assertion by one of the parties

We believe that LC 8002 applies only to the determination of navigability for title under the equal footing doctrine and does not apply to navigability for recreation purposes under the public trust doctrine. These are two separate and distinct determinations. Additionally, LC8002 makes it clear that the bill does not apply to those uses related to hunting, fishing, or trapping.

Sincerely,

/s/

Walt Sales, President  
Association of Gallatin Agricultural Irrigators



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As of: July 28, 2010 (11:37am)

LC8002

\*\*\*\* Bill No. \*\*\*\*

Introduced By \*\*\*\*\*

By Request of the \*\*\*\*\*

A Bill for an Act entitled: "An Act generally revising and clarifying laws related to the treatment of property consisting of the bed of navigable rivers; defining a navigable river; requiring authorization from the board of land commissioners for uses on the beds of navigable rivers; requiring the board of land commissioners to adopt rules for providing easements, leases, or licenses for uses on the beds of navigable rivers; clarifying the authority of the board of land commissioners to grant easements; and amending section 77-2-101, MCA."

Be it enacted by the Legislature of the State of Montana:

**NEW SECTION. Section 1. Legislative findings -- purpose.**

(1) The legislature finds that:

(a) Article IX, section 3, of the Montana constitution provides that the use of all water that is or may be appropriated for sale, rent, distribution, or other beneficial use, the right-of-way over the lands of others for all ditches, drains, flumes, canals, and aqueducts necessarily used in connection with the beneficial use, and the sites for reservoirs necessary for collecting and storing water are a public use;

(b) a person who has historically used the bed of a navigable river in conjunction with a legal use of water or for

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As of: July 28, 2010 (11:37am)

LC8002

other uses or a person who desires to use the bed of a navigable river in conjunction with a legal use of water or for other uses must be able to do so provided that statutory provisions are met;

(c) owners of property adjacent to navigable rivers in Montana have historically been assessed property taxes on the beds of navigable rivers on the premise that the riverbeds are the property of the adjacent property owners;

(d) the historic payment of property taxes on the bed of a navigable river constitutes adequate compensation for any past use of the riverbed and relieves the owner of adjacent property of the duty to compensate the state for past use of the riverbed;

(e) any person who uses the bed of a navigable river after [the effective date of this act] shall apply to the state for a lease, license, or easement and pay full market value for the use of the riverbed; and

(f) the department has not consistently required payment for riverbed uses over time.

(2) The purpose of [sections 1 through 9] is to clarify the historic and future use of the beds of navigable rivers and how the state should be compensated for that use.

NEW SECTION. **Section 2. Definitions.** For the purposes of [sections 1 through 9], the following definitions apply:

(1) "Footprint" means a structure or other constructed interruption or modification to the bed of a navigable river below the low-water mark as provided in 70-16-201.

(2) "Full market value" means an amount calculated based

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As of: July 28, 2010 (11:37am)

LC8002

upon the area of a footprint and the fair market value as determined by rule or statute. The annual payment for a license issued under [sections 1 through 9] is \$150.

(3) "Navigable river" means a river adjudicated as navigable for title purposes by a court of competent jurisdiction.

NEW SECTION. **Section 3. Use of beds of navigable rivers -- authorization requirement restricted.** The board or the department may only require a lease, license, or easement for a footprint on the bed of a navigable river.

NEW SECTION. **Section 4. Historic use of navigable riverbeds -- authorization required -- exemptions.** (1) A person using the bed of a navigable river below the low-water mark without written authorization from the department prior to [the effective date of this act] who wants to continue use of the bed of a navigable river after [the effective date of this act] shall file for authorization of the use on a form prescribed by the department for a lease, license, or easement by July 15, 2017.

(2) A person using the bed of a river below the low-water mark without written authorization from the department who wants to continue use of the bed after the date the river is deemed a navigable river shall file for authorization of the use on a form prescribed by the department for a lease, license, or easement within five years of the date the river after notice is issued by the department as provided in [section 6].

**Unofficial Draft Copy**

As of: July 28, 2010 (11:37am)

LC8002

(3) The application must include:

(a) an application fee of \$50;

(b) a notarized affidavit:

(i) demonstrating that the applicant or the applicant's predecessor in interest used the bed of a navigable river and that the use continues;

(ii) describing the acreage covered by the footprint prior to [the effective date of this act]; and

(iii) demonstrating that the use applied for under this section is the use shown in the evidence provided in subsection (3)(c); and

(c) (i) aerial photographs demonstrating the use to which the application for authorization applies; or

(ii) other evidence of the use to which the application for authorization applies.

(4) The department shall issue the authorization for a lease, license, or easement if:

(a) the applicant provides evidence to satisfy the requirements of subsection (3);

(b) the applicant pays the application fee and the full market value of the footprint acreage;

(c) the department has, if necessary, made a site inspection of the use to which the application for authorization applies;

(d) the authorization is only for the acreage of the footprint historically used by the applicant or the applicant's predecessor in interest; and

**Unofficial Draft Copy**

As of: July 28, 2010 (11:37am)

LC8002

(e) the authorization is approved by the board. The authorization must be approved if the requirements of this section are met.

(5) Proceeds from the application fee must be deposited in the account in [section 5] and must be used by the department to administer the provisions of this section.

(6) The full market value collected pursuant to subsection (4)(b) must be deposited in the appropriate trust fund established for receipt of income from the land over which an authorized use is granted.

(7) Issuance of an authorization pursuant to this section is exempt from the requirements of Title 22, chapter 3, part 4, and Title 75, chapter 1, parts 1 and 2.

(8) The department shall waive the survey requirements of 77-2-102 if the department determines that there is sufficient information available to define the boundaries of the proposed use for the purposes of recording the easement or issuing a license or lease.

(9) The requirements of this section do not apply to footprints:

- (a) related to hunting, fishing, or trapping;
- (b) that existed prior to November 8, 1889;
- (c) for which the applicant can show an easement obtained from a state agency prior to [the effective date of this act] or prior to the date the river was deemed a navigable river; or
- (d) associated with a power site regulated pursuant to Title 77, chapter 4, part 2.

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As of: July 28, 2010 (11:37am)

LC8002

(10) A person using the bed of a navigable river who is subject to [this section] may continue to use the bed of the navigable river for that purpose while applying for an easement, license, or lease or until the applicable time frame for obtaining an lease, license, or easement expires. The state may not impede access to a footprint or use of a footprint during the applicable time frame or after a lease, license, or easement is obtained.

**NEW SECTION. Section 5. Historic riverbed use account. (1)**

There is an account in the state special revenue fund into which the fees collected pursuant to [section 4] must be deposited.

(2) The funds in the account may be used only for administering the provisions of [section 4].

**NEW SECTION. Section 6. Notice required. (1)** The

department shall provide notice of the requirements of [this act] to owners of property adjacent to rivers that are navigable rivers on [the effective date of this act] and provide notice pursuant to subsection (3).

(2) For a river deemed a navigable river after [the effective date of this act] the department shall provide notice of the requirements of [this act] to owners of property adjacent to the navigable river. The five-year period pursuant to [section 4] begins when the department issues this notice and publishes the notice required in subsection (3).

(3) The department shall publish notice of navigable rivers

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As of: July 28, 2010 (11:37am)

LC8002

and the requirements of [this act] twice in a newspaper of general circulation in the area of the navigable river.

NEW SECTION. **Section 7. Navigable riverbed uses -- lease, license, or easement required -- challenges.** (1) (a) After [the effective date of this act], the department shall require a person who proposes to use the bed of a navigable river up to the low-water mark to obtain a lease, license, or easement pursuant to the provisions of this title.

(b) The requirements of subsection (1)(a) do not apply to footprints related to hunting, fishing, or trapping.

(2) An applicant for authorization to use the bed of a navigable river pursuant to [section 4] or for a lease, license, or easement under this section may challenge the requirement of the authorization based on the navigability of the river, the location of footprint related to the low-water mark, or other factors. There is no presumption of navigability because an entity has applied for or received a lease, license, or easement.

NEW SECTION. **Section 8. Easement transferable -- relocation of structure -- increased footprint.** (1) An easement granted pursuant to [section 4 or 7] runs with the benefited land and may be transferred or assigned.

(2) (a) Pursuant to rules adopted under [section 9], the holder of a lease, license, or easement under [section 4 or 7] may relocate a footprint and associated facilities due to the natural relocation of a navigable river or other factors.

**Unofficial Draft Copy**

As of: July 28, 2010 (11:37am)

LC8002

(b) (i) The holder of a lease, license, or easement shall provide written notice to the department when a footprint or associated facilities are proposed to be relocated.

(ii) The holder of a lease, license, or easement for water diversion structures associated with a water right may increase the size of the footprint if the increase is necessary to accomplish the purpose for which the lease, license, or easement was granted if the holder pays full market value for the portion of the footprint that is greater than the original footprint and the applicant has the appropriate state or federal permits.

(3) Section 77-1-805 applies to the use of navigable rivers for which leases, licenses, or easements for the use of the bed have been granted.

NEW SECTION. **Section 9. Board to adopt rules.** To fulfill the requirement of [sections 1 through 9], the board shall adopt rules to:

(1) determine the full market value for the use of a bed of a navigable river and establish a minimum payment for leases and easements;

(2) allow an applicant to choose to apply for a lease, license, or easement depending on the type of proposed use and the duration of the use; and

(3) allow the holder of a lease, license, or easement for water diversion structures associated with a water right to relocate a footprint based on certain circumstances, including but not limited to natural relocation of a navigable river.



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As of: July 28, 2010 (11:37am)

LC8002

**Section 10.** Section 77-2-101, MCA, is amended to read:

**"77-2-101. Easements for specific uses.** (1) Upon proper application as provided in 77-2-102, the board may grant easements on state lands for the following purposes:

- (a) schoolhouse sites and grounds;
- (b) public parks;
- (c) community buildings;
- (d) cemeteries;
- (e) conservation purposes:

- (i) to the department of fish, wildlife, and parks for parcels that are surrounded by or adjacent to land owned by the department of fish, wildlife, and parks as of January 1, 2001;

- (ii) to a nonprofit corporation for parcels that are surrounded by or adjacent to land owned by that same nonprofit corporation as of January 1, 2001; and

- (iii) to a nonprofit corporation for the Owen Sowerwine natural area located within section 16, township 28 north, range 21 west, in Flathead County; and

- (f) for other public uses.

(2) The board may grant easements on state lands for the following purposes:

- (a) right-of-way across or upon any portion of state lands for any public highway or street, any ditch, reservoir, railroad, private road, or telegraph or telephone line, or any other public use as defined in 70-30-102;

- (b) any private building or private sewage system that

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As of: July 28, 2010 (11:37am)

LC8002

encroaches on state lands; or

~~(c) the use of the bed of a navigable river pursuant to  
77-1-1103 or 77-1-1105. (Subsection (2)(c) void on occurrence of  
contingency--sec. 12, Ch. 475, L. 2009.)~~

(c) the use of a bed of a navigable river pursuant to  
[section 4 or 7]."

{Internal References to 77-2-101:  
77-2-105x            77-2-318\*}

**NEW SECTION. Section 11. Codification instruction.**

[Sections 1 through 9] are intended to be codified as an integral part of Title 77, chapter 1, and the provisions of Title 77, chapter 1, apply to [sections 1 through 9].

**NEW SECTION. Section 12. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

- END -

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